Curvet Transport SA & Anor v Shapadu Trans-System Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-16 OF 1998
KAMALANATHAN RATNAM J
9 JULY 1999

Contract *— Formation — Concluded contract — Condition precedent, whether applicable or a mere afterthought created by defendant to avoid legal obligations — Whether all conditions and terms had been agreed upon by parties — Adverse inference drawn against defendant for failure to call general manager as witness to refute plaintiffs' version of events — Whether defendant estopped from denying that there was a valid and concluded binding contract between the parties*

The first plaintiff, incorporated in the Republic of Panama, was the owner of vessel MV 'Enlivener'. The second plaintiff incorporated in the Netherlands operated the MV 'Enlivener' as the agent of the first plaintiff. The defendant was appointed as the official freight forwarder for a project. In April 1997, PW1, the marketing and sales manager of the second plaintiff visited the defendant's office with a view to bidding for the Ocean Transportation contract for the project. The defendant was represented at the meeting by Jamal bin Idris ('Jamal'), the defendant's group general manager and Azahar Ismail ('Azahar'), the assistant general manager. According to PW1, as early as April 1997, Jamal had already promised the plaintiffs first priority for the contract. The meeting was followed by a further meeting on 26 August 1997 whereby the plaintiffs presented the defendant with a quotation for the contract. It was the evidence of PW1 that the defendant accepted the quotation in principle but pending a minor discount to be given by the plaintiffs for the freight. According to PW1, a senior manager of the defendant (DW1) and Azahar again confirmed the awarding of the contract to the plaintiffs save for the formality of Jamal's approval being obtained. Based on this assurance, PW1 gave instruction on 4 September 1997 for the vessel MV 'Enlivener' to proceed to South Korea to be ready for the loading of the first shipment in September 1997.

On 10 September 1997, the plaintiffs received a fax from the defendant in which the defendant accepted the plaintiffs' revised proposal for a reduced freight rate. At the meeting on 12 September 1997, the freight was finally agreed at US$1.8m. It was the evidence of PW2 that as the contract had already been awarded to the plaintiffs in the morning after the resolution of the only outstanding item, ie freight, the plaintiffs were invited for a kick-off meeting where the technical aspects were to be discussed. It was also the evidence of PW2 that at the afternoon meeting, he not only delivered the draft contract of carriage to Jamal but also notified Jamal of the vessel being already on its way to South Korea to be ready for the loading of the first shipment. Jamal's response to this notification was: 'Good, at least we can be sure that there will no delay'. The defendant however awarded the contract to Gajah Navigation Sdn Bhd on 19 September

A 1997. The plaintiffs filed an action against the defendant for breach of contract. The defendant contended that there was no concluded contract between the plaintiffs and the defendant. Even if there was, which was denied, the defendant contended that the plaintiffs had breached a pre-condition which required the successful contracting party to be a Bumiputra company to be first registered with the B Ministry of Finance, Malaysia.

Held, allowing the claim:

(1) There was indeed a concluded contract between the plaintiffs and the defendant when the plaintiffs' revised offer was accepted by C the defendant's fax dated 10 September 1997 or the morning of 12 September 1997 when the final freight rate of US$1.8m was agreed upon between PW2 and Jamal (see p 163E).

(2) The fact that the defendant invited the plaintiff for an afternoon 'kick-off' meeting to discuss technical matters relating to the D 'execution plan' clearly confirmed the existence of a contract as the plaintiffs would not have taken five of its staff for a meeting if the purpose of the meeting was to discuss terms and conditions as opposed to the implementation of a contract. Besides, the very use of the word 'execution plan' envisaged the implementation of an agreement as opposed to the formation of the same E (see p 157B–C).

(3) The fact that Jamal, the general manager and the ultimate authority on whether the contract was to be awarded to the plaintiffs or not, had not been called as a witness to refute the plaintiffs' version of events leading to the conclusion of the F contract must necessarily give rise to the inference that the plaintiffs' version of events was the true vision. The court was therefore constrained to draw an adverse inference against the defendant arising from its failure to call Jamal to give evidence on its behalf (see p 157D–F).

G (4) The defendant knew at all material times that the plaintiffs were foreign companies and not Bumiputra companies and can never be registered with the Ministry of Finance. If there was ever a condition precedent, the defendant knew that the plaintiffs could not comply with such a condition precedent. The defendants should never have entered into negotiations with the plaintiffs, let H alone shortlisted them along with only other party, ie Gajah Navigation Sdn Bhd. The only inference that could be drawn from all these was that the defendant had never informed the plaintiffs of any so-called pre-requisite or condition precedent, any such condition precedent was merely an afterthought created by the defendant in an attempt to avoid its legal obligations to the I plaintiffs (see pp 159H–160A).

(5) The negotiations between the parties were never on a 'subject to contract' basis. In other words, even though no formal contract

was ever executed between the parties, this does not in law preclude the coming into existence of a valid and binding contract between the parties. All material terms and conditions of the contract of carriage had been agreed upon, most importantly the freight rate of US$1.8m had been agreed on the morning of 12 September 1997 (see p 160B–C).

(6) Even if there was in fact no concluded contract between the parties, the court found that on the facts of the present case, the defendant was clearly estopped and precluded from denying that there was a valid and concluded binding contract between the parties (see p 160F).

[Bahasa Malaysia summary

Plaintif pertama, diperbadankan di Republik Panama, adalah tuan punya kapal MV 'Enlivener'. Plaintif kedua yang diperbadankan di Belanda mengendalikan MV 'Enlivener' sebagai agen kepada plaintif pertama. Defendan telah dilantik sebagai penghantar muatan rasmi untuk suatu projek. Pada April 1997, PW1, pengurus pemasaran dan jualan kepada plaintif kedua melawat pejabat defendan bertujuan untuk membida kontrak pengangkutan lautan untuk projek tersebut. Defendan adalah diwakili di mesyuarat oleh Jamal bin Idris ('Jamal'), pengurus besar kumpulan defendan dan Azahar Ismail ('Azahar'), penolong pengurus besar. Menurut PW1 seawal pada April 1997, Jamal telah berjanji kepada plaintif-plaintif keutamaan pertama untuk kontrak tersebut. Mesyuarat tersebut adalah disusuli oleh mesyuarat selanjutnya pada 26 Ogos 1997 di mana plaintif mengemukakan kepada defendan sebut harga untuk kontrak tersebut. Adalah keterangan PW1 bahawa defendan menerima sebut harga tersebut pada prinsipnya tetapi sementara menunggu diskaun kecil yang akan diberikan oleh plaintif untuk muatan tersebut. Menurut PW1, seorang pengurus kanan defendan (DW1) dan Azahar sekali lagi mengesahkan pemberian kontrak tersebut kepada plaintif kecuali formaliti memperolehi kelulusan Jamal. Berdasarkan jaminan tersebut, PW1 memberikan arahan pada 4 September 1997 untuk kapal MV 'Enlivener' untuk belayar ke Korea Selatan untuk bersedia memuatkan kiriman pertama dalam September 1997. Pada 10 September 1997, plaintif menerima faksimile daripada defendan di mana defendan menerima cadangan yang telah diubah oleh plaintif untuk suatu pengurangan kadar harga untuk muatan. Pada mesyuarat pada 12 September 1997, kadar harga untuk muatan adalah pada akhirnya disetujui pada US$1.8 juta. Adalah merupakan keterangan PW2 bahawa kontrak tersebut telah diberikan kepada plaintif-plaintif pada waktu pagi selepas resolusi berkenaan dengan perkara tunggal yang belum diselesaikan, iaitu muatan tersebut; plaintif-plaintif kemudian telah dijemput untuk suatu mesyuarat pemulaan di mana aspek-aspek teknikal akan dibincangkan. Adalah keterangan PW2 bahawa pada mesyuarat petang tersebut, beliau bukan sahaja menghantar deraf kontrak pengangkutan tersebut kepada Jamal tetapi

juga memberitahu Jamal berkenaan dengan kapal tersebut yang sedang dalam perjalanan ke Korea Selatan untuk bersedia memuatkan kiriman pertama tersebut. Respons Jamal kepada pemberitahuan ini adalah: 'Bagus, sekurang-kurangnya kami akan pasti bahawa tidak wujudnya kelewatan'. Defendan walau bagaimanapun memberikan kontrak tersebut kepada Gajah Navigation Sdn Bhd pada 19 September 1997. Plaintif-plaintif memfailkan suatu tindakan terhadap defendan untuk kemungkiran kontrak. Defendan menegaskan bahawa tiada kontrak mengikat antara plaintif-plaintif dan defendan. Jikalau ada, yang mana adalah dinafikan, defendan menegaskan bahawa plaintif-plaintif telah memungkiri pra syarat yang memerlukan pihak berkontrak yang berjaya terdiri daripada syarikat Bumiputera yang didaftarkan dengan Kementerian Kewangan, Malaysia.

Diputuskan, membenarkan tuntutan:

(1) Terdapatnya kontrak mengikat antara plaintif-plaintif dan defendan di mana tawaran yang telah diubah oleh plaintif telah diterima oleh faksimile defendan bertarikh pada 10 September 1997 atau pada waktu pagi 12 September 1997 apabila kadar harga untuk muatan pada akhirnya sebanyak US$1.8 juta telah dipersetujui di antara PW2 dan Jamal (lihat ms 163E).

(2) Fakta bahawa defendan menjemput plaintif untuk mesyuarat permulaan pada waktu petang untuk membincangkan perkara-perkara teknikal berkenaan dengan 'pelan pelaksanaan' dengan jelasnya mengesahkan kewujudan suatu kontrak kerana plaintif-plaintif tidak akan membawa lima kakitangan-kakitangannya untuk suatu mesyuarat jika matlamat mesyuarat tersebut adalah untuk membincangkan terma-terma dan syarat-syarat dan bukan tentang pelaksanaan suatu kontrak. Tambahan lagi, penggunaan perkataan 'pelan pelaksanaan' dengan sendirinya membayangkan pelaksanaan suatu perjanjian dan bukan pembentukan suatu perjanjian (lihat ms 157B–C).

(3) Fakta bahawa Jamal, pengurus besar dan autoriti muktamad sama ada kontrak tersebut adalah diberikan kepada plaintif atau tidak, telah tidak dipanggil sebagai saksi untuk menyangkal versi peristiwa-peristiwa oleh plaintif yang membawa kepada pembentukan kontrak tersebut, semestinya menimbulkan inferens bahawa versi peristiwa-peristiwa oleh plaintif adalah versi yang benar. Mahkamah dengan demikian adalah dipaksa untuk membuat kesimpulan tentang inferens bertentangan terhadap defendan yang timbul daripada kegagalannya untuk memanggil Jamal untuk memberikan keterangan bagi pihaknya (lihat ms 157D–F).

(4) Defendan mengetahui pada semua masa yang material bahawa plaintif-plaintif adalah syarikat-syarikat asing dan bukan syarikat-syarikat Bumiputera dan tidak boleh didaftarkan dengan

Kementerian Kewangan. Jika pernah wujudnya pra syarat, defendan mengetahui plaintif tidak dapat memenuhi pra syarat yang sedemikian. Defendan-defendan langsung tidak seharusnya memasuki suatu perundingan dengan plaintif-plaintif apalagi memasukkan dalam senarai terpilih bersama-sama dengan satu pihak lain iaitu Gajah Navigation Sdn Bhd. Inferens tunggal yang boleh disimpulkan daripada semua ini adalah defendan tidak memberitahu plaintif-plaintif tentang apa-apa yang dipanggil pra keperluan atau pra syarat; sebarang pra syarat sedemikian cuma sesuatu yang difikirkan kemudian oleh defendan dalam suatu cubaan untuk mengelak daripada tanggungjawab-tanggung-jawabnya di bawah undang-undang terhadap plaintif-plaintif (lihat ms 159H–160A).

(5) Perundingan-perundingan di antara pihak-pihak tidak pernah atas dasar 'tertakluk kepada kontrak'. Dalam erti kata lain, walaupun tiada kontrak secara formal telah dilaksanakan antara pihak-pihak, ini tidak secara undang-undang menghalang kewujudan suatu kontrak yang sah dan mengikat antara pihak-pihak tersebut. Semua terma-terma dan syarat-syarat yang material kontrak muatan tersebut telah dipersetujui, yang paling penting, kadar harga untuk muatan sebanyak US$1.8 juta telah dipersetujui pada pagi 12 September 1997 (lihat ms 160B–C).

(6) Jikalau pun sebenarnya tiada wujudnya kontrak yang mengikat di antara pihak-pihak tersebut, mahkamah mendapati bahawa daripada fakta-fakta kes ini, defendan dengan jelasnya adalah diestop dan dihalang daripada menafikan bahawa terdapatnya suatu kontrak sah dan mengikat antara pihak-pihak tersebut (lihat ms 160F).]

Notes

For cases on concluded contract, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2169–2172.

Cases referred to

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Waltons Stores (Interstate) Limited v Maher & Anor (1987–1988) 164 CLR 387 (refd)

K Anantham (*Skrine & Co*) for the plaintiff.

JC Fernandez (*Mary Manickam* with him) (*JC Fernendez & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Plaintiffs' case

The first plaintiff incorporated in the Republic of Panama is the owner of vessel MV 'Enlivener'. The second plaintiff incorporated in the Netherlands operates various vessels of the Royal NedLloyd Group including the MV 'Enlivener' as the agent of the first plaintiff. The defendant was appointed as the official freight forwarder for the Petronas Fertilizer Kedah Project ('the project'). The MV 'Enlivener' is a specialised heavy lift vessel. PW1, the marketing and sales manager of the second plaintiff, visited the defendant's office in April 1997 together with the managing director of the second plaintiff, A Peterse. The visit was with the view to bidding for the Ocean Transportation contract of heavy and oversized cargo for the project. The defendant was represented at this meeting by Azahar Ismail, the assistant general manager of the defendant (DW2), and Jamal bin Idris, the defendant's group general manager. At this meeting, the plaintiffs' representatives explained the nature of the plaintiffs' business, its operation, its capabilities, its interest in the Ocean Transportation contract and its ability to fulfil the same. The meeting at the office of the defendant in April 1997 was followed by a dinner attended by Jamal and Azahar (DW2) on behalf of the defendant. According to the evidence of PW1, as early as April 1997, Jamal had already promised the plaintiffs first priority for the Ocean Transportation contract.

The meeting in April 1997 was followed by a further meeting on 26 August 1997. At this meeting, the plaintiffs presented the defendant with a quotation for the Ocean Transportation contract. The quotation was based on a packing list earlier furnished by the defendant. It is the evidence of PW1 that at this meeting, the defendant represented by Sapee bin Ismail, a senior manager of the defendant (DW1) accepted their quotation in principle but pending a minor discount to be given by the plaintiffs for the freight. In that quotation, the plaintiffs quoted a freight rate of US$1,838,500. The meeting at the office of the defendant on 26 August 1997 was followed by a dinner at the Ming Court Hotel in Jalan Ampang where the plaintiffs were represented by PW1, PW2 and one Fajardin Kamarudin and the defendant by DW1 and DW2. According to PW1, DW1, and DW2 again confirmed the awarding of the Ocean Transportation Contract for the project to the plaintiffs save for the formality of Jamal's approval being obtained. Based on this assurance, PW1 gave instructions on 4 September 1997 for the vessel MV 'Enlivener' to proceed to South Korea to be ready for the loading of the first shipment in September 1997.

To meet the defendant's request for a further discount, the plaintiffs despatched a revised proposal on 9 September 1997 and which proposal incorporated a reduced freight rate of US$1,810,000. This quotation was despatched on 9 September 1997 but erroneously dated 26 August 1997. The next significant fact in this case was the receipt by the plaintiffs of a fax from the defendant on 10 September 1997. In this fax, the defendant accepted the plaintiffs' revised proposal.

Two meetings were held on 12 September 1997. The first was, in the morning between PW2 and Jamal, who was the general manager of the defendant and the chairman of the management tender committee. The second was between five representatives of the plaintiffs and the defendant. At the earlier meeting, after extensive negotiations between PW2 on behalf of the plaintiffs and Jamal, the freight was finally agreed at the further discounted rate of US$1.8m. It is the evidence of PW2 that as the Contract had already been awarded to the plaintiffs in the morning after the resolution of the only outstanding item, that is, freight, the plaintiffs were invited for a kick-off meeting where the technical aspects were to be discussed. It is also the evidence of PW2 that at the afternoon meeting, he not only delivered the draft contract of carriage to Jamal but also notified Jamal of the MV 'Enlivener' being already on its way to South Korea to be ready for the loading of the first shipment. Jamal's response to this notification, according to PW2, was 'Good, at least, we can be sure that there will no delay'.

The defendant however awarded the Ocean Transportation contract to Gajah Navigation Sdn Bhd under a Booking Note 78/97 dated 19 September 1997. Sometime after 12 September 1997, upon hearing rumours that the defendant had changed its mind and had awarded the contract to a competitor, PW1 visited Malaysia and contacted Jamal and DW2 on 23 September 1997. PW1 protested the awarding of the contract to Gajah Navigation Sdn Bhd since the contract had earlier been awarded to the plaintiffs. The plaintiffs also caused a letter of demand to be despatched to the defendant alleging that the defendant had acted in breach of its contract with the plaintiffs in awarding the contract to Gajah Navigation Sdn Bhd. The plaintiffs received no response to this letter from the defendant or its solicitors.

The claim

The first plaintiff's claim is for the sum of US$234,506 as loss of income due to the breach of contract. The second plaintiff's claim is for a sum of US$221,250 being 15% of the agreed freight of US$1.8m. The plaintiff also prayed for interest and costs.

Case for the defence

The defendant contends that there was no concluded contract between the plaintiffs and the defendant. Even if there was which was denied, the defendant contended that the plaintiffs had breached a pre-condition which required the successful contracting party to be first registered with the Ministry of Finance, Malaysia.

Findings of the court

Was there a contract between the parties?

The defendant, at the meeting on 26 August 1997, with the knowledge of the terms and conditions proposed by the plaintiffs for the Ocean

A Transportation contract for the project, notified the plaintiffs that the awarding of the Ocean Going contract to the plaintiffs was a mere formality. That it was indeed, a formality, was confirmed when the plaintiffs received the fax wherein the defendant 'agreed' to the revised proposal of the plaintiffs. I hold that the use of the word 'agreed' clearly constitutes an acceptance of the offer contained in the revised proposal.

B Any argument that there was no contract because the freight issue was still outstanding cannot stand since on the morning of 12 September 1997, the freight was agreed at US$1.8m. The fact that the defendant invited the plaintiffs for an afternoon 'kick-off' meeting to discuss technical matters relating to the 'execution plan' clearly confirmed the existence of a contract C as the plaintiffs would not have taken five of its staff for a meeting if the purpose of the meeting was to discuss terms and conditions as opposed to the implementation of a contract. Besides, the very use of the word 'execution plan' envisages the implementation of an agreement as opposed to the formation of the same.

D That a contract had been concluded is also borne out by the fact that there was no denial of the existence of the contract when PW1 and PW2 confronted Jamal on 23 September 1997. Neither was there a reply to the letter of demand from the solicitors for the plaintiffs alleging the existence of a contract between the plaintiffs and the defendant.

The fact that Jamal, the general manager and the ultimate authority on E whether the contract was to be awarded to the plaintiff or not has not been called as a witness to refute the plaintiffs' version of events leading to the conclusion of the contract, must necessarily give rise to the inference that the plaintiffs' version of events is the true version. I am therefore constrained to draw an adverse inference against the defendant arising from its failure to call Jamal to give evidence on its behalf.

F The contents of the letter from Gajah Navigation Sdn Bhd dated 12 September 1997 further lends credence to the plaintiffs' claim that there was a concluded contract. It is necessary to reproduce this letter:

> Date: 12 September 1997
>
> G Shapadu Trans-System Sdn Bhd
> 165-A, Persiaran Raja Muda Musa
> 42000 Port Klang
> Selangor Darul Ehsan
>
> Attn: Mejar (B) Mohd Jamal bin Idris
>
> H Sir,
>
> *Re: Gurun Fertilizer Plant*
>
> Reference is made to our telephone conversation this morning.
>
> We regret to be advised that it is Shapadu's intention to award the ocean transportation of the above mentioned project to a carrier, which, is not I controlled or operated by Malaysian interests.
>
> With respect, we appeal to Shapadu to reconsider its position. In view that Gajah Navigation is registered with the Ministry of Finance, as a

Malaysian owner of a specialised heavy lift vessel, with emphasis on Petronas related projects.

We hereby reconfirm our interest to participate on the ocean carriage of the said Project.

As a Malaysian company, we hope we can realize and implement our government's call for increased local participation.

Together Malaysia 'boleh'!!

Yours sincerely,

Sgd
Ahmad Kamal bin Mohd Yusoff
cc: Ministry of Finance
cc: Petronas Contract Division

Firstly, the letter refers to a telephone conversation presumably with Jamal since it is marked to his attention. The use of the word 'reconsider' in this letter coupled with the reference to a telephone conversation suggest that Jamal had in a telephone conversation on the morning of 12 September 1997 notified Gajah Navivation Sdn Bhd that he had awarded the contract to the plaintiff. This conversation is consistent with PW2's evidence that the only outstanding issue was resolved with Jamal on the morning of 12 September 1997. Secondly, the reference to a telephone conversation in the said letter gives rise to the irresistible inference that there was no meeting between the defendant and Gajah Navigation Sdn Bhd on 12 September 1997 contrary to the claims of DW1 and DW2. Thirdly, Gajah's reference to their continued interest in the contract is consistent with they having been told that their offer had been rejected.

The suggestion of the defendant that it was never serious in its negotiations with the plaintiffs is unacceptable. There had been a meeting between PW1, A Peterse and DW2 as early as in April 1997. Further, since the first shipment was to take place in September 1997 it is inconceivable that the defendant was only meeting with possible contracting parties much later. This must be considered in the light of the Memorandum of Understanding signed by the defendant with their partner in Japan, Nippon Express Co Ltd, confirming that the dateline for their notification of the successful party in respect of the Ocean Going contract was 31 August 1997. Given this dateline it is inconceivable that the defendant was not keen to contract as soon as possible.

The next issue raised by the defence is that only a Bumiputra company registered with the Ministry of Finance is eligible to be awarded the contract for the Ocean Transport contract, this being a pre-requisite or a condition precedent. The clause relating to this issue between the Government of Malaysia and the defendant is cl 13. The same which is reproduced, reads as follows:

13.2 Sea

13.2.1 The carrier to be utilised by the COMPANY in the order of priority is as follows:

13.2.1.1 the carrier is a shipping company incorporated in Malaysia and is a Bumiputra shipping company registered with the Ministry of Finance, Malaysia, whose vessel is —

(a) owned by a citizen of Malaysia or company incorporated in Malaysia; and/or

(b) registered in Malaysia;

13.2.1.2 the carrier referred to in Clause 13.2.1.1 which operate through a joint service with any third party provided that the bill of lading is issued by such carrier.

13.2.1.3 the carrier referred to in Clause 13.2.1.1 which charters a vessel;

13.2.1.4 the carrier is a shipping company incorporated in Malaysia whose vessel is —

(a) owned by a citizen of Malaysia or company incorporated in Malaysia; and/or

(b) registered in Malaysia; or

13.2.1.5 the carrier is a foreign shipping company provided that the carrier referred to in Clauses 13.2.1.1, 13.2.1.2, 13.2.1.3 and 13.2.1.4 is not available.

It is obvious that this clause does not preclude the awarding of the Ocean Going contract to the plaintiff. It merely provides that priority should be given to Bumiputra companies registered with the Ministry of Finance. Clause 13.2 certainly does not absolutely prohibit the awarding of the contract to an entity such as the plaintiffs.

In any event I hold that the defendant is estopped from relying on such a defence as DW1 had conceded in cross-examination that the defendant was aware when faxing the acceptance of the plaintiffs' revised proposal that the plaintiffs were not registered with the Ministry of Finance. Both PW1 and PW2 have testified that the defendant's representatives had never at any time whatsoever mentioned to them any requirement about the successful carrier for the Ocean Transportation contract having to be a Bumiputra company or registered with the Ministry of Finance. PW2 has impressed me as an honest and straight-forward witness.

The defendant's allegation that, at the outset, the defendant had made known to the plaintiffs the so-called condition precedent that the plaintiffs have to be a Bumiputra company and registered with the Ministry of Finance is unacceptable. The defendant knew at all material times that the plaintiffs are foreign companies and not Bumiputra companies and can never be registered with the Ministry of Finance. In short, if there was ever such a condition precedent the defendant knew that the plaintiffs could not comply with such a condition precedent. The defendant should never have even entered into negotiations with the plaintiffs, let alone short-listed them along with only one other party, namely, Gajah Navigation Sdn Bhd. The

only inference that I can draw from all these is that the defendant had never informed the plaintiffs of any so-called pre-requisite or condition precedent and any such condition precedent is merely an afterthought created by the defendant in an attempt to avoid its legal obligations to the plaintiffs. A

Even Jamal, when awarding the contract to the plaintiffs on the morning of 12 September, made no reference to the contract being conditional upon the plaintiffs obtaining the certification from the Ministry of Finance. B

It is pertinent to note that the negotiations between the parties were never on a 'subject to contract' basis. In other words, even though no formal contract was ever executed between the parties, this does not in law preclude the coming into existence of a valid and binding contract between the parties. All the material terms and conditions of the contract of carriage had been agreed upon, most importantly, the freight rate of US$1.8m had been agreed on the morning of 12 September 1997. C

On 9 September 1997, the plaintiffs had given to the defendant a revised proposal which proposal was expressly accepted by the defendant by way of its fax dated 10 September 1997. Then, in the morning of 12 September 1997, the final freight rate of US$1.8m was agreed upon between PW2 and Jamal. D

In any case in respect of a sister company of the plaintiff, namely, Skanza Mammoet Sdn Bhd, the Ministry of Finance had waived the similar precondition, since the said sister company was not registered with the Ministry of Finance by granting to it the contract for the inland transportation of the project. In other words, there was already a precedent set. E

Estoppel F

Even if there was in fact no concluded contract between the parties, I find that, on the facts of the present case, the defendant is clearly estopped and precluded from denying that there was a valid and concluded binding contract between the parties.

In *Waltons Stores (Interstate) Ltd v Maher & Anor* (1987–1988) 164 CLR 387 the facts were, briefly, as follows: G

> Towards the end of 1983 a company negotiated with the owner of land to lease it. The owner was to demolish a building and construct a new one to the company's specifications. The company's solicitor forwarded a draft lease to the owner's solicitor to which the latter suggested certain amendments. On 7 November the owner's solicitor told the company's solicitor that it was essential that the agreement be concluded within the next day or so, for otherwise the owner would be unable to organise building supplies before the Christmas closure. He also said that the owner did not wish to demolish the building until it was clear that there were no problems with the lease. The company's solicitor said that the company had notified him orally that the suggested amendments to the draft lease were acceptable but he would get formal instructions and would tell the owner's solicitor the next day whether the company disagreed with any of them. He then sent the owner's solicitor a H I

redrafted lease incorporating the suggested amendments. The company's solicitor did not object to the amendments on the next day or at all. On 11 November the owner's solicitor forwarded to the company's solicitor an executed lease 'by way of exchange'. The owner then began to demolish the building. About a week later the company had second thoughts about proceeding with the transaction, and after having been told by its solicitor that it was not bound to proceed unless parts were exchanged, told him to 'go slow'. Shortly thereafter, the company became aware that the demolition was proceeding. Early in January 1984, the owner commenced building works. The building was about 40 per cent completed when, on 19 January, the company said that it did not intend to proceed. The company's solicitor did not communicate with the owner's solicitor between 11 November and 19 January. He retained the lease executed by the owner.

The High Court of Australia held, inter alia, that although for want of an exchange of parts no binding agreement for a lease had come into existence, the company was estopped from denying that it was bound, on the ground that it was estopped from retreating from its implied promise to complete the contract because, knowing the owner was exposing himself to detriment by acting on the basis of a false assumption, it was unconscionable for it to adopt a course of inaction which encouraged him in the course he had adopted and on the further ground that the retention of the executed lease by the company's solicitor and the company's deliberate silence and inaction had caused the owner mistakenly to assume that a binding contract existed and to act on that assumption to his detriment; and on the ground that the company's imprudence in failing to inform the owner that exchange might not occur caused the owner to act on the assumption that an exchange had taken place, and it would be unjust and unfair to allow departure from that assumption.

The *Waltons Stores* case was cited by our Federal Court in the case of wherein Gopal Sri Ram JCA stated that the doctrine of estoppel had been applied in the *Waltons Stores* case to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent and to create binding obligations where none previously existed.

In the *Boustead* case, our Federal Court decided that mere silence can constitute active encouragement and give rise to an estoppel. At p 346 of his judgment, his Lordship says the following:

> Thus far we have dealt with the operation of the doctrine in the context of there having been offered some active encouragement by the party sought to be estopped. But we do not apprehend the law to be different when the encouragement comes in the form of silence. The true principle in such cases is to be found in the following passage in the judgment of Thesiger LJ in *De Bussche v Alt* (1878) 8 Ch D 286 at p 314:
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> > 'If a person having a right, and seeing another person about to commit, or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act.'

Further, at p 347, his Lordship goes on to say the following:

> Before we conclude on the law upon the subject at hand, there are two elements of the doctrine of estoppel which we think require clarification and restatement. The first concerns the effect which the representation or encouragement had upon the mind of the person relying upon the estoppel; the second has to do with the requirement that such a person should have acted to his detriment.
>
> The traditional view adopted by jurists of great learning is that a litigant who invokes the doctrine must prove that he was induced by the conduct of his opponent to act in a particular way. However, having undertaken a careful examination of the authorities, we are of opinion that this requirement is not an integral part of the doctrine. All that a representee (which term includes one who has received encouragement in the sense we have discussed earlier) need do is to place sufficient material before a court from which an inference may fairly be drawn that he was influenced by his opponent's actings. Further, it is not necessary that the conduct relied upon was the sole factor which influenced the representee. It is sufficient that 'his conduct was so *influenced* by the encouragement or representation ... that it would be unconscionable for the representator thereafter to enforce his strict legal rights' (per Robert Goff J in *Amalgamated Investment* [1982] 1 QB 84 at p 105).

Based on the principles enunciated in the *Waltons Stores* and the *Boustead*, I make the following findings:

(a) The defendant's representatives had never informed the plaintiffs of their so-called condition precedent that the successful carrier for the Ocean Transportation contract must be a Bumiputra company and be registered with the Ministry of Finance.

(b) On the contrary, the defendant's representatives, in particular, DW1, DW2 and, most importantly, Jamal, who did not give evidence on behalf of the defendant, had, at all material times, represented to the plaintiffs through PW1 and PW2 and had led them to believe that the Ocean Transportation contract was theirs.

(c) In reliance thereon and influenced by the defendant's actions and representations, the plaintiffs had incurred substantial expenses and gone to great lengths in despatching the vessel MV 'Enlivener' to South Korea on 4 September 1997 to be ready for the first shipment in September 1997.

(d) PW2 had informed Jamal on the morning of 12 September 1997 that the plaintiffs had despatched the vessel to South Korea for the first shipment.

(e) Instead of telling PW2 that the vessel was despatched at the plaintiffs' own risk because the defendant had not awarded the contract to the plaintiffs and made no assurances about awarding the contract to the plaintiffs, Jamal, the defendant's group general manager and chairman of the management tender committee, responded with the words, 'Good — at least we can be sure that there will be no delay.'

(f) In short, the defendant had at all material times actively encouraged the plaintiffs in their assumption that they had been awarded the Ocean Transportation contract.

In the circumstances, it was unconscionable and unjust for the defendant, after 12 September 1997, to turn around and maintain that there was no valid and binding contract between the parties. The defendant is therefore estopped by the equitable doctrine of estoppel from denying that there was a valid and binding contract of carriage for the freight rate of US$1.8m with the plaintiffs.

The defendant did not come to court with clean hands. On the one hand, the defendant maintains that, right from the outset, it had notified the plaintiffs that it was a condition precedent or pre-requisite that the successful carrier has to be a Bumiputra company and registered with the Ministry of Finance. Then, on 30 September 1997, two weeks after the defendant had already awarded the Ocean Transportation Contract to Gajah Navigation Sdn Bhd, the defendant purports to write to the Ministry of Finance in terms of the letter in exh D1 asking the Ministry for confirmation on the applicable policy in respect of the use of the National Carrier. This again clearly shows that the defendant had never ever informed the plaintiffs of any condition for their appointment as carrier for the project.

I have no hesitation in holding that there was indeed a concluded contract between the plaintiffs and the defendant when the plaintiffs' revised offer was accepted by the defendant's fax dated 10 September 1997 or on the morning of 12 September 1997 when the final freight rate of US$1.8m was agreed upon between PW2 and Jamal. In the circumstances I hold that the defendant was clearly in breach of its contract with the plaintiffs when it awarded the Ocean Transportation contract to Gajah Navigation Sdn Bhd.

Who should have called Jamal

The defendant contends that the plaintiffs should have called Jamal to prove the truth or otherwise of his committed statements, namely, when Jamal said to PW1 during the dinner in April 1997 when he confirmed that the shipping part of the project would be the plaintiffs' by saying, 'Don't worry, if the other people will give you trouble, call me' and further when on 12 September 1997 after the final freight rate had been agreed upon between PW2 and Jamal and when PW2 informed Jamal that the plaintiffs had already despatched the MV 'Enlivener' to South Korea to be in time for the first shipment and Jamal responded 'Good, at least we can be sure that there will be no delay'. Jamal was the general manager of the defendant and chairman of the tender management committee. The plaintiffs' witnesses confirmed that Jamal spoke those words. If the defendant wished to deny them surely it was the duty of the defendant to have called Jamal more so when Jamal was their own material witness. It was on account of this that I had earlier invoked s 114(g) of the Evidence Act 1950 against the defendant. As a matter of fact, before the conclusion of the trial, learned

counsel for the defendant did at one point indicate that Jamal would be the second witness for the defendant. This showed that Jamal was certainly available to give evidence. There was no evidence or explanation led by the defendant as to why such a material witness as Jamal did not give evidence.

It is my judgment that if as the defendant submits, there was at all material times no concluded contract and that the defendant could not have awarded the contract to the plaintiffs who were not a Bumiputra company not registered with the Ministry of Finance, Jamal would not and should not have, in all good conscience, responded in the manner that he did. Jamal should have immediately told PW2 that the plaintiffs had despatched the vessel to South Korea at their own risk because, as far as the defendant was concerned, there was no concluded contract between the parties. Instead Jamal by his response encouraged the plaintiffs to persist in thinking that they were acting properly in despatching the vessel to South Korea so as to be in time for the first shipment by saying, 'Good at least we can be sure that there will be no delay'.

Damages

PW1 led evidence in respect of the first plaintiff's claim for the sum of US$234,506. He contended that, but for the defendant, the plaintiffs would have earned an income of US$339,000 for the first shipment as stated in 1 CABD 92 (the common agreed bundle of documents). However, there were several expenses which were not incurred by the first plaintiff since the vessel never entered any port in the course of its voyage to Korea or in the port of Ulsan, in Korea. This resulted in a saving of US$23,307. Additionally, since the vessel travelled empty and returned empty, there was a saving of US$23,000 for loading costs and US$20,000 for discharging costs. Finally, because the vessel went empty and returned empty, there was a saving of US$37,187 by way of bunker costs. This he said represented the difference between a voyage with cargo and a voyage without cargo. The aggregate of savings amounted to US$104,494. Hence PW1 contended that the first plaintiff's claim is for the sum of US$234,506 as the loss of income suffered by it, arising from the despatch of MV 'Enlivener' to Korea and its return without any cargo by reason of the defendant's breach of contract. I accept this evidence which is supported by 2 CABD 130 which gives a complete breakdown of the plaintiffs' claim.

I also award the second plaintiff the sum of US$221,250 being its commission at the flat rate of 15% of the freight earned under the contract of carriage on the total agreed freight being US$1.8m.

The plaintiffs will earn interest on their respective awards at 4%pa. from date of service of the writ on the defendant and costs.

Claim allowed.

Reported by Jafisah Jaafar